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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JUANITA ISABEL ARGUELLO,
Plaintiff,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social
Security,
Defendant.

CASE NO. CV 18-4592 SS

MEMORANDUM DECISION AND ORDER

I.

INTRODUCTION

Juanita Isabel Arguello ("Plaintiff") brings this action seeking to overturn the decision of the Acting Commissioner of Social Security (the "Commissioner" or "Agency") denying her application for Supplemental Security Income ("SSI"). The parties consented pursuant to 28 U.S.C. § 636(c) to the jurisdiction of the undersigned United States Magistrate Judge. (Dkt. Nos. 11-13). For the reasons stated below, the decision of the Commissioner

1 is REVERSED, and this case is REMANDED for further administrative
2 proceedings consistent with this decision.

3
4 **II.**

5 **THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

6
7 To qualify for disability benefits, a claimant must
8 demonstrate a medically determinable physical or mental impairment
9 that prevents the claimant from engaging in substantial gainful
10 activity and that is expected to result in death or to last for a
11 continuous period of at least twelve months. Reddick v. Chater,
12 157 F.3d 715, 721 (9th Cir. 1998) (citing 42 U.S.C. § 423(d)(1)(A)).
13 The impairment must render the claimant incapable of performing
14 work previously performed or any other substantial gainful
15 employment that exists in the national economy. Tackett v. Apfel,
16 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C.
17 § 423(d)(2)(A)).

18
19 To decide if a claimant is entitled to benefits, an
20 Administrative Law Judge ("ALJ") conducts a five-step inquiry. 20
21 C.F.R. §§ 404.1520, 416.920. The steps are:

22
23 (1) Is the claimant presently engaged in substantial gainful
24 activity? If so, the claimant is found not disabled. If
25 not, proceed to step two.

26 (2) Is the claimant's impairment severe? If not, the
27 claimant is found not disabled. If so, proceed to step
28 three.

1 (3) Does the claimant's impairment meet or equal one of the
2 specific impairments described in 20 C.F.R. Part 404,
3 Subpart P, Appendix 1? If so, the claimant is found
4 disabled. If not, proceed to step four.

5 (4) Is the claimant capable of performing his past work? If
6 so, the claimant is found not disabled. If not, proceed
7 to step five.

8 (5) Is the claimant able to do any other work? If not, the
9 claimant is found disabled. If so, the claimant is found
10 not disabled.

11
12 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari,
13 262 F.3d 949, 953-54 (9th Cir. 2001); 20 C.F.R. §§ 404.1520(b)-
14 (g)(1), 416.920(b)-(g)(1).

15
16 The claimant has the burden of proof at steps one through four
17 and the Commissioner has the burden of proof at step five.
18 Bustamante, 262 F.3d at 953-54. Additionally, the ALJ has an
19 affirmative duty to assist the claimant in developing the record
20 at every step of the inquiry. Id. at 954. If, at step four, the
21 claimant meets his or her burden of establishing an inability to
22 perform past work, the Commissioner must show that the claimant
23 can perform some other work that exists in "significant numbers"
24 in the national economy, taking into account the claimant's
25 residual functional capacity ("RFC"), age, education, and work
26 experience. Tackett, 180 F.3d at 1098, 1100; Reddick, 157 F.3d at
27 721; 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1). The Commissioner
28 may do so by the testimony of a vocational expert ("VE") or by

1 reference to the Medical-Vocational Guidelines appearing in 20
2 C.F.R. Part 404, Subpart P, Appendix 2 (commonly known as "the
3 grids"). Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001).
4 When a claimant has both exertional (strength-related) and non-
5 exertional limitations, the Grids are inapplicable and the ALJ must
6 take the testimony of a VE. Moore v. Apfel, 216 F.3d 864, 869 (9th
7 Cir. 2000) (citing Burkhart v. Bowen, 856 F.2d 1335, 1340 (9th Cir.
8 1988)).

10 III.

11 THE ALJ'S DECISION

12
13 The ALJ employed the five-step sequential evaluation process
14 and concluded that Plaintiff was not disabled within the meaning
15 of the Act. (AR 25-34). At step one, the ALJ found that Plaintiff
16 has not engaged in substantial gainful activity since August 25,
17 2014, the application date. (AR 27). At step two, the ALJ found
18 that Plaintiff's psoriatic arthritis, left knee effusion, obesity,
19 fibromyalgia, and history of liver disease are severe impairments.¹
20 (AR 27). At step three, the ALJ determined that Plaintiff does
21 not have an impairment or combination of impairments that meet or
22 medically equal the severity of any of the listings enumerated in
23 the regulations. (AR 28-29).

24
25
26 ¹ The ALJ found that Plaintiff's medically determinable
27 impairment of depression does not cause more than a minimal
28 limitation in her ability to perform basic mental work activities
and is therefore nonsevere. (AR 27-28).

1 The ALJ then assessed Plaintiff's RFC and concluded that she
2 can perform sedentary work as defined in 20 C.F.R. § 416.967(a)
3 except:²

4
5 [Plaintiff can] frequently climb ramps/stairs;
6 frequently balance, stoop, kneel, crouch, crawl; never
7 climb ladders, ropes, scaffolds; frequent gross
8 manipulation bilaterally; avoid concentrated exposure to
9 extreme cold, humidity, hazards including dangerous
10 machinery and heights.

11
12 (AR 29). At step four, the ALJ found that Plaintiff is unable to
13 perform any past relevant work. (AR 32). Based on Plaintiff's
14 RFC, age, education, work experience, and the VE's testimony, the
15 ALJ determined at step five that there are jobs that exist in
16 significant numbers in the national economy that Plaintiff can
17 perform, including election clerk, sorter, and order clerk. (AR
18 33). Accordingly, the ALJ found that Plaintiff was not under a
19 disability as defined by the Act since August 25, 2014, the date
20 the application was filed. (AR 33-34).

21
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23
24 ² "Sedentary work involves lifting no more than 10 pounds at a
25 time and occasionally lifting or carrying articles like docket
26 files, ledgers, and small tools. Although a sedentary job is
27 defined as one which involves sitting, a certain amount of walking
28 and standing is often necessary in carrying out job duties. Jobs
are sedentary if walking and standing are required occasionally
and other sedentary criteria are met." 20 C.F.R. § 416.967(a).

1 IV.

2 STANDARD OF REVIEW

3
4 Under 42 U.S.C. § 405(g), a district court may review the
5 Commissioner's decision to deny benefits. "[The] court may set
6 aside the Commissioner's denial of benefits when the ALJ's findings
7 are based on legal error or are not supported by substantial
8 evidence in the record as a whole." Aukland v. Massanari, 257 F.3d
9 1033, 1035 (9th Cir. 2001) (citing Tackett, 180 F.3d at 1097); see
10 also Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996) (citing
11 Fair v. Bowen, 885 F.2d 597, 601 (9th Cir. 1989)).

12
13 "Substantial evidence is more than a scintilla, but less than
14 a preponderance." Reddick, 157 F.3d at 720 (citing Jamerson v.
15 Chater, 112 F.3d 1064, 1066 (9th Cir. 1997)). It is "relevant
16 evidence which a reasonable person might accept as adequate to
17 support a conclusion." (Id.). To determine whether substantial
18 evidence supports a finding, the court must "'consider the record
19 as a whole, weighing both evidence that supports and evidence that
20 detracts from the [Commissioner's] conclusion.'" Aukland, 257 F.3d
21 at 1035 (quoting Penny v. Sullivan, 2 F.3d 953, 956 (9th Cir.
22 1993)). If the evidence can reasonably support either affirming
23 or reversing that conclusion, the court may not substitute its
24 judgment for that of the Commissioner. Reddick, 157 F.3d at 720-
25 21 (citing Flaten v. Sec'y of Health & Human Servs., 44 F.3d 1453,
26 1457 (9th Cir. 1995)).

1 V.

2 DISCUSSION

3
4 Based on the VE's testimony, the ALJ found that Plaintiff
5 could not perform her past relevant work as an agricultural produce
6 sorter, housekeeper, or packager, but that there are other jobs
7 that exist in significant numbers in the national economy that she
8 can perform, including election clerk, sorter, and order clerk.
9 (AR 32-33; see id. 70-71). Plaintiff contends that the ALJ failed
10 to resolve an apparent conflict between the DOT and the VE's
11 testimony regarding the election clerk position, and further erred
12 in his consideration of Plaintiff's language skills. (Dkt. No. 17
13 at 5-7).

14
15 At step five of the sequential evaluation process, "the
16 Commissioner has the burden to identify specific jobs existing in
17 substantial numbers in the national economy that a claimant can
18 perform despite his identified limitations." Zavalin v. Colvin,
19 778 F.3d 842, 845 (9th Cir. 2015) (citation omitted). In making
20 this finding, the ALJ determines "whether, given the claimant's
21 RFC, age, education, and work experience, he actually can find some
22 work in the national economy." Zavalin, 778 F.3d at 846 (citation
23 omitted); see also 20 C.F.R. § 404.1520(g) ("we will consider [your
24 RFC] together with your vocational factors (your age, education,
25 and work experience) to determine if you can make an adjustment to
26 other work"). The Commissioner may meet this burden by adopting
27 the testimony of a VE or by reference to the Grids. Osenbrock,
28 240 F.3d at 1162. "In making this determination, the ALJ relies

1 on the [Dictionary of Occupational Titles (DOT)], which is the
2 [Agency's] primary source of reliable job information regarding
3 jobs that exist in the national economy." Zavalin, 778 F.3d at
4 845-46 (citation omitted); see 20 C.F.R. § 404.1566(d)(1) (noting
5 that the Agency "will take administrative notice of reliable job
6 information available from various governmental and other
7 publications," including the DOT); SSR 00-4p, at *2 ("In making
8 disability determinations, [the Agency relies] primarily on the
9 DOT . . . for information about the requirements of work in the
10 national economy.").

11
12 The VE's occupational testimony should be consistent with the
13 DOT. SSR 00-4p, at *2. "When a VE . . . provides evidence about
14 the requirements of a job or occupation, the [ALJ] has an
15 affirmative responsibility to ask about any possible conflict
16 between that VE . . . evidence and information provided in the
17 DOT." Id. at *4. "For a difference between [the VE's] testimony
18 and the [DOT's] listings to be fairly characterized as a conflict,
19 it must be obvious or apparent." Gutierrez v. Colvin, 844 F.3d
20 804, 808 (9th Cir. 2016). When there is an apparent conflict
21 between the VE's testimony and the DOT, "[n]either the DOT nor the
22 VE . . . evidence automatically 'trumps.'" SSR 00-4p, at *2. In
23 such a situation, the Commissioner has an affirmative duty to
24 resolve the conflict -- for example, by eliciting a reasonable
25 explanation from the VE -- before relying on the affected portion
26 of the VE's testimony in support of a disability determination.
27 Id.; see Zavalin, 778 F.3d at 846; Massachi v. Astrue, 486 F.3d
28 1149, 1153-54 (9th Cir. 2007). "The ALJ's failure to resolve an

1 apparent inconsistency may leave [the court] with a gap in the
2 record that precludes [the court] from determining whether the
3 ALJ's decision is supported by substantial evidence." Zavalin,
4 778 F.3d at 846.

5
6 Based on the VE's testimony, the ALJ found that Plaintiff can
7 perform the position of "election clerk," DOT 205.367-030. (AR
8 33; see id. 71).³ The DOT describes the position of "election
9 clerk" as follows:

10
11 Performs any combination of the following duties during
12 elections: Compiles and verifies voter lists from
13 official registration records. Requests identification
14 of voters at polling place. Obtains signatures and
15 records names of voters to prevent voting of unauthorized
16 persons. Distributes ballots to voters and answers
17 questions concerning voting procedure. Counts valid
18 ballots and prepares official reports of election
19 results.

20
21 DICOT 205.367-030, 1991 WL 671719 (emphasis added). The
22 Commissioner is required to evaluate a claimant's ability to
23 perform "work activity on a regular and continuing basis." 20
24 C.F.R. § 416.945(b) (emphasis added). "A 'regular and continuing

25
26 ³ The hearing transcript erroneously transcribed "election"
27 clerk as "collection" clerk. (AR 71). Nevertheless, the
28 transcript and the ALJ's decision clearly indicate DOT 205.367-
030, which refers to "election clerk." (AR 33, 71).

1 basis' means 8 hours a day, for 5 days a week, or an equivalent
2 work schedule." SSR 96-8p, at *1. The DOT's description of
3 "election clerk," which references work "during elections," appears
4 to describe a position that is not "regular and continuing." An
5 apparent conflict therefore existed between the VE's testimony,
6 describing work that Plaintiff was capable of performing on a
7 regular and continuing basis, and the DOT's description of an
8 election clerk. See Gutierrez, 844 F.3d at 808 (ALJ must evaluate
9 VE's testimony using common sense understanding of job). The ALJ
10 had an affirmative duty to request a reasonable explanation from
11 the VE for this apparent conflict before relying on the VE's
12 testimony to support the ALJ's conclusion that Plaintiff is not
13 disabled. See De Perez v. Comm'r of Soc. Sec., No. 17 CV 0404,
14 2018 WL 3473967, at *7 (E.D. Cal. July 18, 2018) (finding an
15 apparent conflict between the DOT's description of an election
16 clerk and the VE's testimony that the claimant can perform "regular
17 and continuing" work); Hill v. Colvin, 807 F.3d 862, 872 (7th Cir.
18 2015) (Posner, J., concurring) ("Obviously [the election clerk
19 position] is occasional rather than full-time employment, because
20 elections are not held continuously."); Burney v. Berryhill, 276
21 F. Supp. 3d 496, 500-01 (E.D.N.C. 2017) (finding the ALJ's decision
22 not supported by substantial evidence in part because "the job of
23 election clerk is only available during elections"). The record
24 does not indicate that such an inquiry was made.

25
26 Defendant contends "[t]he regulations do not . . . require
27 that the ALJ prove that the work was substantial gainful activity."
28 (Dkt. No. 18 at 3). Instead, Defendant argues that "the regulations

1 require only that the ALJ find that other work exists in significant
2 numbers in the national economy that Plaintiff could do, given her
3 residual functional capacity and vocational factors." (Id.)
4 (citing 20 C.F.R. §§ 416.920(g) and 416.960(c)). However, the
5 governing statute explicitly states an individual is disabled if
6 he cannot "engage in any other kind of substantial gainful work
7 which exists in the national economy." 42 U.S.C. § 1382c(a)(3)
8 (emphasis added); see Chevron, U.S.A., Inc. v. Nat. Res. Def.
9 Council, Inc., 467 U.S. 837, 843 (1984) (agency given deference
10 only if regulations not inconsistent with statute). Further, the
11 Agency's own regulations require the ALJ to evaluate whether a
12 claimant is capable of performing work on a regular and continuing
13 basis, as discussed above. Thus, an apparent conflict existed
14 between the VE's testimony and the DOT, which the ALJ failed to
15 resolve. Accordingly, the ALJ's step-five decision was not
16 supported by substantial evidence and remand is required.

17
18 The ALJ's error was not harmless. See Burch v. Barnhart, 400
19 F.3d 676, 679 (9th Cir. 2005) (an ALJ's decision will not be
20 reversed for errors that are harmless). The other occupations
21 identified by the VE that Plaintiff can perform, sorter and order
22 clerk, each accounted for only 5,000 jobs in the national economy.
23 (AR 33; see id. 71). The remaining 10,000 jobs found by the VE
24 "may not amount to a significant number of jobs in the national
25 economy." Randazzo v. Berryhill, 725 F. App'x 446, 448 (9th Cir.
26 2017) ("The ALJ's error in relying on the vocational expert's
27 testimony regarding the occupation of small products assembler was
28 not harmless because the remaining 10,000 electrical accessories

1 assembler jobs found by the expert may not amount to a significant
2 number of jobs in the national economy."); see Beltran v. Astrue,
3 700 F.3d 386, 390 (9th Cir. 2012) (1,680 national jobs is not
4 sufficient); Gutierrez v. Comm'r of Soc. Sec., 740 F.3d 519, 529
5 (9th Cir. 2014) (whether 25,000 national jobs is sufficient
6 "presents a close call"); Lemauga v. Berryhill, 686 F. App'x 420,
7 422 (9th Cir. 2017) (noting that the Ninth Circuit "has never found
8 [12,600 jobs in the national economy] to be significant"); Lisa L.
9 v. Commissioner Of Social Security, No. 17 CV 1874, 2018 WL 6334996,
10 at *4 (D. Or. Dec. 5, 2018) ("the Court finds that 11,084 jobs does
11 not meet the significant number standard"); Alvarenga v. Berryhill,
12 No. 16 CV 9191, 2018 WL 400740, at *5 (C.D. Cal. Jan. 12, 2018)
13 (8,900 jobs available nationally "may not amount to a significant
14 number"); Tara M. v. Commissioner of Social Security, No. C18-5226,
15 2018 WL 6313220, at *4 (W.D. Wash. Nov. 1, 2018), report and
16 recommendation adopted sub nom. Miller-Evans v. Comm'r of Soc.
17 Sec., No. C18-5226, 2018 WL 6305597 (W.D. Wash. Dec. 3, 2018)
18 (7,257 jobs in the national economy not significant); Burtenshaw
19 v. Berryhill, No. 16 CV 2243, 2018 WL 550590, at *2 (C.D. Cal. Jan.
20 23, 2018) ("6500 national jobs may not amount to a significant
21 number of jobs in the national economy"). Therefore, without the
22 election clerk position, the Court cannot confidently conclude that
23 no reasonable ALJ "could have reached a different disability
24 determination." Stout v. Comm'r, Soc. Sec. Admin., 454 F.3d 1050,
25 1056 (9th Cir. 2006) ("a reviewing court cannot consider the error
26 harmless unless it can confidently conclude that no reasonable
27 ALJ . . . could have reached a different disability
28 determination").

1 Plaintiff also contends that the ALJ failed to resolve an
2 apparent conflict in her ability to communicate in English and the
3 VE's testimony. (Dkt. No. 17 at 7-10). The ALJ found that
4 Plaintiff is able to read and write simple messages in English.
5 (AR 32). Plaintiff's RFC, however, did not include the ALJ's
6 language finding. (AR 29). Moreover, the three occupations
7 identified by the VE -- election clerk (DOT 205.367-030), sorter
8 (DOT 209.687-022), and order clerk (DOT 209.567-014) -- are all
9 classified as SVP 2 positions. (AR 33, 71). A job's specific
10 vocational preparation ("SVP") rating "speak[s] to the issue of
11 the level of vocational preparation necessary to perform the job."
12 Meissl v. Barnhart, 403 F. Supp. 2d 981, 983 (C.D. Cal. 2005)
13 (citation omitted). Unlike an SVP 1 position, which requires only
14 that the employee be able to speak and write simple sentences, an
15 SVP 2 position requires the employee to read at a rate of 190 words
16 per minute, write compound and complex sentences properly, and
17 speak clearly and distinctly with correct pronunciation. DICOT,
18 App. C., 1991 WL 688702.

19
20 Defendant contends the record indicated that Plaintiff "was
21 entirely capable of communicating, reading, and writing in English
22 at least [at] the language level 2 level." (Dkt. No. 18 at 5-6).
23 However, the Court is "constrained to review the reasons the ALJ
24 asserts." Connett v. Barnhart, 340 F.3d 871, 874 (9th Cir. 2003)
25 (citing Sec. & Exch. Comm'n v. Chenery Corp., 332 U.S. 194, 196
26 (1947)). The court "review[s] only the reasons provided by the
27 ALJ in the disability determination and may not affirm the ALJ on
28 a ground upon which he did not rely." Garrison, 759 F.3d at 1010.

1 Here, the ALJ explicitly found that Plaintiff can "read or write
2 simple messages in English" (AR 32), which appears to conflict with
3 the jobs identified by the VE. Thus, an apparent conflict existed
4 between Plaintiff's ability to communicate in English and the DOT,
5 which the ALJ failed to resolve. Accordingly, the ALJ's step-five
6 decision was not supported by substantial evidence and remand is
7 required.

8
9 **VI.**

10 **CONCLUSION**

11
12 Accordingly, IT IS ORDERED that Judgment be entered REVERSING
13 the decision of the Commissioner and REMANDING this matter for
14 further proceedings consistent with this decision. IT IS FURTHER
15 ORDERED that the Clerk of the Court serve copies of this Order and
16 the Judgment on counsel for both parties.

17
18 DATED: January 7, 2019

19
20 /S/
SUZANNE H. SEGAL
21 UNITED STATES MAGISTRATE JUDGE

22 **THIS DECISION IS NOT INTENDED FOR PUBLICATION IN WESTLAW,**
23 **LEXIS/NEXIS OR ANY OTHER LEGAL DATABASE.**